CHAPTER 2

KEY ISSUES

2.1 Submissions and witnesses were generally supportive of the introduction of a legislative framework to facilitate and investigate public interest disclosures, and to provide protection to 'public officials' who make such disclosures.[1] Despite expressing in-principle support, a number of concerns were raised in relation to the Bill and several of its underlying policies. Some of these concerns related to:

- the Bill's complexity;
- the number and uncertainty of requirements for making an external disclosure;
- concerns that internal disclosures to a public official's immediate supervisor or manager may not be covered by the Bill;
- the limitations on making an emergency disclosure;
- the apparent exclusion of conduct connected with an intelligence agency and the exclusion of 'intelligence information' from non-internal public interest disclosures;
- the omission of the word 'knowingly' in clause 11 as it relates to loss of immunity from civil, criminal or administrative liability for making a false or misleading statement; and
- the omission of conduct of members of parliament and their staff from the public interest disclosure framework.

---

1 Community and Public Sector Union (CPSU), *Submission 5*, p. 1; Australian Council of Trade Unions, *Submission 6*, p. 2; Rule of Law Institute of Australia, *Submission 8*, p. 2; Professor AJ Brown, *Committee Hansard*, 24 May 2013, p. 6; Dr Suelette Dreyfus, *Committee Hansard*, 24 May 2013, p. 7. The committee notes that all submissions received from Australian Government departments and agencies were fully supportive of the Bill: see Australian Security Intelligence Organisation and Australian Secret Intelligence Service, *Submission 7*, p. 4; Department of Veterans' Affairs, *Submission 11*, p. 1; Department of Immigration and Citizenship, *Submission 16*, p. 1; Australian Customs and Border Protection Service, *Submission 26*, p. 5. The committee also notes that the independent statutory agencies to be given oversight of the scheme were supportive of the Bill: see Commonwealth Ombudsman, *Submission 3*, p. 6; Inspector-General of Intelligence and Security, *Submission 10*, p. 4.

Complexity of the Bill

2.2 A number of submissions and witnesses criticised the complexity of the Bill; and highlighted the importance of, and need for, clear and logically-structured legislation which is accessible and able to be easily understood by those seeking to rely on it in the context of a public interest disclosure framework.[2]

2.3 For example, Dr Suelette Dreyfus from the University of Melbourne argued:

> In order to have a properly functioning public interest disclosure bill, it is extremely important that the provisions are easy to understand and that they function to encourage people to make disclosures. This Bill falls short in several places where it serves to confuse a whistleblower and consequently discourage them from making that disclosure.[3]

2.4 Professor AJ Brown from Griffith University told the committee that it is crucial for the mechanical and practical provisions of the Bill to be drafted appropriately, otherwise it would be better not to have the legislation at all.[4] Professor Brown described some of the Bill's problematic aspects:

> Currently the Bill contains a large number of technical barriers and exclusions...which make the Bill more difficult than necessary to navigate. As a result, while it provides a basic framework for a potentially workable regime, it is unlikely to achieve [a pro-disclosure culture] without substantial amendment.[5]

2.5 The Accountability Round Table submitted that 'the Bill, in its current form, falls short of best practice in a number of significant respects and, as a result, significantly fails to meet its stated objectives'.[6]

2.6 Mr Howard Whitton, an associate at the University of Canberra's National Institute for Governance, was also critical:

> The Bill is very complex. It is my submission that the Bill is so complex that it is difficult even for experts to understand many of its provisions and their interactions…
>
> It is likely that most intending whistleblowers will need a lawyer at their elbow to understand the many procedural steps required for a disclosure to be granted 'protection', and even then it is not possible to be certain [from the beginning] that a given disclosure will in fact be protected…

---

2 See, for example, Dr Suelette Dreyfus, *Submission 14*, p. 9; Mr Howard Whitton, *Submission 25*, pp 3-4; Professor AJ Brown, *Committee Hansard*, 24 May 2013, p. 6; Dr Gabrielle Appleby, *Committee Hansard*, 24 May 2013, p. 16.

3 *Submission 14*, p. 9.

4 *Committee Hansard*, 24 May 2013, p. 6.

5 *Submission 28*, p. 5.

6 *Submission 17*, p. 2.

> Overall, the Bill's excessively complicated processes and inadequate definitions fail to respond to real-world issues which other Australian jurisdictions' Whistleblower Protection laws – notably those of New South Wales, the ACT, and Queensland – resolved satisfactorily almost two decades ago.[7]

Departmental response

2.7 At the public hearing, an officer from the Department of the Prime Minister and Cabinet (Department) addressed concerns about the Bill's complexity as follows:

> [T]he trade-off in legislation is very often between certainty and simplicity. Legislation can be expressed in very simple and broad principle based terms if the people affected by it are happy to forgo a high degree of certainty. In the case of [the Bill] a good deal of what is being called 'complexity' is because we have sought to set out very clearly what can and cannot be disclosed, in what circumstances disclosure is protected and what steps a person has to go through in order to make a protected internal or external disclosure. What is being called the 'complexity' of the bill is driven by the need to make those things very clear. Much of what is sought to be done by way of removing complexity could also have the effect of making the provisions less clear and less certain.[8]

2.8 The departmental officer also informed the committee that, once the Bill is implemented, a person seeking to make a public interest disclosure would not necessarily need to refer to the Bill itself:

> [I]n relation to the way in which legislation is implemented, of course, once a scheme is in effect usually what people have reference to is not so much the primary legislation as the guidance about how to use [it]. Most of us do not read the [T]ax [A]ct but we do go to the material put out by the tax office about how to fill in our tax return. Similarly, we are all governed by procedures that affect our responsibilities as public servants and we do not necessarily all go and read the [*Public Service Act 1999*] every day, but when we do have a concern there are proper channels and guidance for us to go [to] the Public Service Commission and seek advice. I would envisage that many of the issues being raised in the terms of 'a poor officer at a junior level would find it difficult to know what to do if they read the legislation', what they would actually do is go to the authorised officer in their agency and say, 'I have a concern about what looks like misconduct. How do I go about disclosing that?'[9]

---

7 *Submission 25*, pp 3-4.

8 Ms Renée Leon, Department of the Prime Minister and Cabinet, *Committee Hansard*, 24 May 2013, p. 28.

9 Ms Renée Leon, Department of the Prime Minister and Cabinet, *Committee Hansard*, 24 May 2013, p. 28.

2.9 On this point, the Department's answers to questions put on notice by the committee referred to a number of measures in the Bill, which are designed to assist public officials to make a public interest disclosure. Those measures are mainly found in Division 1 of Part 4 and relate to the additional obligations of 'principal officers'[10] and 'authorised officers',[11] along with some additional functions of the Ombudsman and the IGIS, including:

- that principal officers must take reasonable steps to ensure that the number of authorised officers is sufficient to ensure they are readily accessible by public officials who belong to the agency, and to ensure that public officials who belong to the agency are aware of the identity of each of the authorised officers; and
- the Ombudsman (for non-intelligence agencies) and the IGIS (for intelligence agencies) are to conduct education and awareness programs for agencies and public officials relating to the scheme contained in the legislation.[12]

External disclosures

2.10 Many submissions commented on the clauses in the Bill which provide for the making of external disclosures to 'any person other than a foreign public official'.[13] In particular, submissions referred to the numerous 'further requirements' in item 2 of the table in subclause 26(1) in relation to making an external disclosure.[14] Those further requirements include:

- the discloser must have made a previous internal disclosure of the information that is now being externally disclosed; and
- a disclosure investigation into the previous internal disclosure has been completed, and/or the investigation has not been completed within the timeframes provided for in the Bill; and
- the investigation of the previous internal disclosure, and/or the response to the investigation, has been 'inadequate'; and
- the disclosure is not, on balance, 'contrary to the public interest'; and

---

10 'Principal officer' is defined in clause 73.

11 'Authorised officer' is defined in clause 36.

12 Answers to questions on notice, received 20 May 2013, pp 2-3, referring to paragraphs 59(3)(b) and (c) (Additional obligations of principal officers) and paragraph 62(b) (Additional functions of the Ombudsman) and paragraph 63(b) (Additional functions of the IGIS).

13 See, for example, Dr Gabrielle Appleby, Dr Judith Bannister, Ms Anna Olijnyk, *Submission 9*, pp 5-9; Australian Broadcasting Corporation (ABC), *Submission 12*, pp 6-7; Blueprint for Free Speech, *Submission 13*, pp 3-6; Accountability Round Table, *Submission 17*, pp 11-12.

14 See, for example, CPSU, *Submission 5*, p. 4; Joint Media Organisations, *Submission 19*, p. 3; Law Council of Australia, *Submission 24*, p. 10.

- no more information is publicly disclosed than is reasonably necessary in the public interest; and
- the information does not consist of, or include, 'intelligence information'.[15]

2.11 Submissions also expressed concern that there is no certainty that a public official making an external disclosure will be entitled to the protections in the Bill.[16]

2.12 The Law Council of Australia described the difficulties which may confront a public official who is considering whether or not to make an external disclosure:

> Unless all of these conditions are met [for an external disclosure], Item 2 will not apply and the discloser will not be able to rely on [clause 10 for immunity] protection. It is not sufficient that the discloser has a belief on reasonable grounds that these preconditions have been met. Whether or not all of these preconditions have been met would ultimately be a matter for decision by a court.
>
> This leaves the individual who is considering making a disclosure in a most uncertain position. Whether he or she does benefit from the protection intended to be afforded by [clause] 10 and related provisions of the Bill may depend on a court's assessment at some time in the future and with more information than is available to the individual when they make their disclosure about broad and imprecise concepts…
>
> These provisions do not adequately support disclosures in the public interest because they do not give sufficient clarity about when there will be protection.
>
> It is not realistic to expect individuals to make decisions about whether or not to make a disclosure in the public interest with this level of uncertainty about whether or not they will be protected by the provisions of the legislation, and having regard to the high risks those individuals face if the legislation does not protect them.[17]

---

15 Item 2 of the table in subclause 26(1). A number of submissions expressed concern about the requirement that an external disclosure must not contain or include 'intelligence information'. This issue is discussed further later in this chapter.

16 See, for example, CPSU, *Submission 5*, pp 4-5; Dr Gabrielle Appleby, Dr Judith Bannister, Ms Anna Olijnyk, *Submission 9*, pp 5-9; Dr Suelette Dreyfus, *Submission 14*, p. 5.

17 *Submission 24*, p. 10. See also, CPSU, *Submission 5*, p. 4.

Contrary to the public interest

2.13 An external disclosure cannot, on balance, be contrary to the public interest.[18] Subclause 26(3) sets out a list of factors which a person must have regard to when determining whether a disclosure will be contrary to the public interest. Many submissions criticised this aspect of the external disclosure regime.[19]

2.14 For example, Dr Gabrielle Appleby, Dr Judith Bannister and Ms Anna Olijnyk, academics at the University of Adelaide, argued:

> Subclause 26(3) provides a list of matters that the discloser *must* have regard to before determining whether disclosure is contrary to the public interest. The list includes a range of matters familiar from freedom of information legislation that are all grounds for exempting documents from disclosure. Cabinet information, international relations, interstate relations, security and defence, legal professional privilege and the administration of justice are all there. No factors in favour of disclosure are listed, in contrast to the approach now adopted in the pro-disclosure freedom of information regimes. Listing only factors weighing against disclosure in this way sends a message to would-be disclosers that areas of government that have traditionally maintained secrecy are still out of bounds.
>
> If a public interest test is to be retained, we recommend that factors in favour of disclosure be listed to assist with the complex process of balancing competing public interests. Objects weighing in favour of disclosure could include the objects of the legislation and the seriousness of the disclosable conduct.[20]

2.15 Blueprint for Free Speech criticised the nature of the test in subclause 26(3), observing that it 'does not emanate from any public interest disclosure legislation in any country in the world'.[21] Specifically:

> [Subclause 26(3)] effectively turns the 'public interest' test on its head and serves only to instill fear and confusion in a whistleblower. Effectively, it assumes a malicious intent on the part of the discloser and places the burden of proof on that person to establish that the information not only is in the public interest (which in itself should be an objective test and the burden on the whistleblower should only be that he or she honestly believe[s] it to be the case, on reasonable grounds) but also requires that they prove (on the basis of this drafting, on their own knowledge of an

---

18 Paragraph (e) of item 2 of the table in subclause 26(1).

19 See, for example, Dr Gabrielle Appleby, Dr Judith Bannister, Ms Anna Olijnyk, *Submission 9*, pp 7-8; ABC, *Submission 12*, p. 7; Blueprint for Free Speech, *Submission 13*, pp 5-6; Tax Justice Network Australia, *Submission 27*, p. 8.

20 *Submission 9*, p. 8, emphasis in original.

21 *Submission 13*, p. 5.

> objective balancing act) that the information is not *contrary* to the public interest as well.[22]

2.16 Professor Brown recommended that subclause 26(3) should be removed from the Bill in its entirety:

> [Subclause] 26(3) can and should simply be deleted, since a general public interest test regarding public (external) disclosures is already contained in the Table in [subclause] 26(1) ('(f) No more information is publicly disclosed than is reasonably necessary in the public interest'). Anything more than a test of this kind, reverses the built-in public interest test on which the entire Bill is based – which is that if information is about wrongdoing, and the factual circumstances are met, it should be disclosed, unless there are very specific and serious overriding reasons why not.[23]

Departmental response

2.17 In relation to subclause 26(3), the Explanatory Memorandum (EM) merely restates the list of factors that a person must have regard to when determining whether a disclosure will be contrary to the public interest, and does not offer any further explanation as to why this approach has been used.[24]

2.18 At the public hearing, a departmental officer explained that subclause 26(3) needs to be read in conjunction with other provisions in the Bill:

> When we read the legislation we read it as a whole. We assume that people are going to read all the legislation having regard to the objects. We have already stated at the very outset of the bill the public interest objectives that are being pursued. We could restate them, but we assume people are approaching it the way we would approach any [A]ct, which is to read it consistently with the objects of the [A]ct, and to read each part in the context of the other parts of the [A]ct, rather than to restate every part of it. That is the approach that the [Bill] takes. It sets out very clearly at the outset the public interest objectives that are being pursued, so we think the whole [Bill] ought to be read in light of those.[25]

22 *Submission 13*, p. 6, emphasis in original.

23 *Submission 28*, p. 7.

24 Explanatory Memorandum (EM), p. 15.

25 Ms Renée Leon, Department of the Prime Minister and Cabinet, *Committee Hansard*, 24 May 2013, p. 36.

Requirement that internal investigation or response has been inadequate

2.19 In order to make an external disclosure either, or both, of the following requirements must be met:

- if the investigation into the prior internal disclosure is an investigation under Part 3 of the Bill – that the investigation was inadequate; and/or
- the response to the investigation was inadequate.[26]

2.20 Clauses 37-39 of the Bill describe the circumstances when an investigation or response to an investigation will be inadequate.

2.21 Clause 37 provides that an investigation under Part 3 is inadequate if, and only if, any of the following applies:

- the investigation has not been completed within the time limit set out in the Bill;[27] or
- there is a failure to obtain information that is reasonably available, relevant and materially significant in the course of conducting the investigation; or
- the findings set out in the report of the investigation are such that no reasonable person could have reached them on the basis of the information obtained in the course of conducting the investigation; or
- the report of the investigation does not set out findings or recommendations that could reasonably have been made on the basis of the information obtained in the course of conducting the investigation.

2.22 Subclause 38(1) sets out that a response to an investigation under Part 3 is inadequate if, and only if, a report sets out recommendations that action be taken, and a reasonable period has passed since the report was prepared, and either:

- no reasonable person would consider that the action that has been, is being, or is to be, taken in response to the recommendations is adequate; or
- no action has been, is being, or is to be, taken in response to the recommendations.[28]

---

26 Paragraph (d) of item 2 of the table in subclause 26(2).

27 Subclause 52(1) provides that an investigation must be completed within 90 days of the allocation to the agency concerned. Subclauses 52(3) and (4) provide for extensions of 90 days and for further extensions (which may exceed 90 days).

28 EM, p. 20. Subclause 38(2) provides that, to the extent that a response to an investigation under Part 3 has been taken, is being, or is to be taken by a Minister or either of the Presiding Officers of the Houses of the parliament, the response is for the purposes of the Bill taken not to be inadequate (EM, p. 20).

2.23 Subclause 39(1) provides that a response to a disclosure investigation that is not an investigation under Part 3 is inadequate only if no reasonable person would consider that the action that has been taken – or is being, or is to be, taken – in response to the investigation is adequate.[29]

2.24 In their submission, Dr Appleby, Dr Bannister and Ms Olijnyk argued that clauses 37-39 'use legalistic tests that will be difficult for lay persons to interpret'. Dr Appleby, Dr Bannister and Ms Olijnyk suggested a number of alternative tests, including using the model set out in section 20 of the *Public Interest Disclosure Act 2010* (Qld), which provides that a person may make a disclosure to a journalist where that person has made a public interest disclosure and the entity to which the disclosure was made, or referred:

- decided not to investigate or deal with the disclosure; or
- investigated the disclosure but did not recommend the taking of any action in relation to the disclosure; or
- did not notify the person, within six months after the date the disclosure was made, whether or not the disclosure was to be investigated or dealt with.[30]

2.25 Professor Brown argued that the objective standards in the tests in clauses 37-39 are inconsistent with the Australian Government's response to the 2009 House of Representatives Committee's report, in which the government accepted a recommendation for protection to still apply to an external disclosure if a sufficient subjective standard was met: that is, if the discloser had a reasonable belief that the response was not adequate or appropriate.[31]

Departmental response

2.26 On the nature of the objective test in clauses 37-39, the Department noted:

> [T]he Bill has a greater focus on inadequacy in an investigation or as a response to an investigation as a criterion for a protected external public interest disclosure. For example, under [subparagraph] 20(1)(b)(ii) of the *Public Interest Disclosure Act 2010* (Qld) a criterion for external disclosure is that an entity has investigated the disclosure but did not recommend the taking of action in relation to the disclosure. The criterion does not require consideration to be given as to whether the absence of a recommendation to take action is justifiable. In contrast, under [paragraph] 37(d) of the Bill, an investigation is inadequate if the report of the investigation does not set out

29 EM, p. 20. Subclause 39(2) provides that to the extent that a response to an investigation has been taken, is being, or is to be taken by a Minister or either of the Presiding Officers of the Houses of the parliament, the response is for the purposes of the Bill taken not to be inadequate (EM, p. 20).

30 *Submission 9*, pp 6-7.

31 *Submission 28*, p. 10. See also, Dr Gabrielle Appleby, Dr Judith Bannister, Ms Anna Olijnyk, *Submission 9*, p. 7; CPSU, *Submission 5*, p. 4.

> findings or recommendations that could reasonably be expected to have been made on the basis of the information obtained in the course of conducting the investigation.[32]

2.27 As to the reasons that an objective test has been included in the Bill, and not a subjective test, the Department provided the following explanation:

> Application of some of the grounds for inadequacy in clauses 37 and 38 will be factual…Application of other grounds incorporate objective elements…The approach taken in the Bill is intended to provide clear rules as to when an investigation or response is taken to be inadequate. Objective elements provide a clearer basis for giving guidance on when a discloser could have a reasonable belief that an investigation or response to an investigation is inadequate.[33]

Requirement for initial internal disclosure

2.28 A number of submissions and witnesses expressed opposition to the Bill's requirement that, in order to make an external disclosure, a person must first make an internal disclosure.[34]

2.29 Blueprint for Free Speech gave the following examples of when an internal disclosure may be impossible or inappropriate:

> [There may be] endemic corruption through the discloser's line management, where the person receiving the disclosure is involved in the wrongdoing, where time is a pressing factor, where the discloser believes internal disclosure will assist in a 'cover-up' of the wrongdoing or where the discloser fears imminent reprisal. In a practical sense, the history of corruption in Australia clearly shows instances where reporting internally can lead to risk of life or limb by reason of a disclosure[.][35]

2.30 Dr Dreyfus noted that, since the Bill creates the requirement that the discloser must first make a disclosure internally – and only when the investigation into the particular wrongdoing is not dealt with adequately would he or she be able to make an external disclosure – that lapse in time could result in the discloser facing reprisal, or the wrongdoing which they intended to expose having worsened or become irreversible.[36]

---

32 Answers to questions on notice, received 20 May 2013, p. 7.

33 Answers to questions on notice, received 20 May 2013, pp 7-8.

34 See, for example, Blueprint for Free Speech, *Submission 13*, p. 4; Dr Suelette Dreyfus, *Submission 14*, p. 5.

35 *Submission 13*, p. 4. See also, Dr Suelette Dreyfus, *Submission 14*, p. 5; Professor AJ Brown, *Submission 28*, p. 11.

36 *Submission 14*, p. 5.

2.31 Both Dr Dreyfus and Blueprint for Free Speech expressed support for an alternative mechanism to be included in the Bill to allow a person to make an external disclosure, in certain circumstances where an internal disclosure is not appropriate. Specifically, a public official should be able to make a public interest disclosure to a third party (such as, a member of parliament or a journalist) where the person believes, on reasonable grounds, that:

- there is disclosable conduct; and
- there is a significant risk of detrimental action to him or her (or someone else) if an internal disclosure were to be made; and
- it would be unreasonable in all the circumstances for the public official to make an internal disclosure.[37]

2.32 Dr Dreyfus argued that it is important to give people a range of options for disclosure:

> The idea is that you should select a range of protected options that are reasonable, to give people a choice because you do not know where the serious wrongdoing or the corruption is in the organisation and, in a sense, only the whistleblower is best placed to make that assessment.[38]

Departmental response

2.33 In answers to questions on notice, the Department explained why the external disclosure provisions have been drafted with the requirement of an initial internal disclosure:

> The emphasis of the scheme is on disclosures of wrongdoing being reported to and investigated within government. This emphasis is designed to ensure that problems are identified and rectified. Where a discloser does not wish to make a disclosure to their own agency the disclosure could be made to the Ombudsman or the IGIS (if the conduct involved an intelligence agency) or to a prescribed investigative agency that has power to investigate the disclosure otherwise than under the Bill.[39]

2.34 The Department also pointed out that 'the criteria for an emergency disclosure permit disclosure without prior internal disclosure if there are exceptional circumstances justifying such a disclosure (and the other criteria are met)'.[40]

---

37 *Committee Hansard*, 24 May 2013, p. 10; *Submission 13*, pp 4-5, respectively. A similar test is used in subsection 27(2) of the *Public Interest Disclosure Act 2012* (ACT).

38 *Committee Hansard*, 24 May 2013, p. 12.

39 Answers to questions on notice, received 20 May 2013, p. 8.

40 Answers to questions on notice, received 20 May 2013, p. 8.

Internal disclosures to an immediate supervisor or manager

2.35 The primary concern raised in relation to the internal disclosure provisions was that a disclosure to a person's supervisor or manager is not covered under the Bill, unless the supervisor or manager is an 'authorised officer' (or 'authorised internal recipient').[41]

2.36 The Community and Public Sector Union (CPSU) argued that 'in practice a lot of public interest disclosures would be made to the discloser's supervisor or manager'.[42] At the public hearing, Ms Louise Persse, Assistant National Secretary of the CPSU, elaborated on some specific concerns:

> [I]t is likely that often the first person people will tell about something of this nature is their immediate supervisor. One of the questions that we have is: if someone does that, do the protections then apply because that person is not the designated reporting person in this current structure…Firstly, if you make a disclosure to your supervisor, is the matter then dealt with? Secondly, are the protections…triggered should you make a disclosure to your supervisor and then experience some adverse outcome for yourself for having—to use the colloquial term—blown the whistle?[43]

2.37 Dr Appleby, Dr Bannister and Ms Olijnyk also supported protection being available under the Bill for initial disclosures made to someone other than an 'authorised internal recipient'. Dr Appleby, Dr Bannister and Ms Olijnyk referred to the work of the 'Whistling While They Work' project (lead by Griffith University), which found that the vast majority of disclosures are made to immediate supervisors:

> A person who wishes to make a disclosure, but is unfamiliar with the requirements of the [Bill], might naturally approach their supervisor, manager, or a person with responsibility for the matters to which the disclosure relates. Such a person [however] may not be the authorised internal recipient.[44]

2.38 The Accountability Round Table argued that disclosures to supervisors and managers should be specifically covered under the Bill:

> That option [of disclosure to people in a supervisory or management position] recognises the experience that whistleblowers will go to someone they know and trust rather than an authorised officer. It enables whistleblowers to choose a person in whom they have confidence.

---

41 See, for example, CPSU, *Submission 5*, pp 3-4; Accountability Round Table, *Submission 17*, p. 8. 'Authorised internal recipient' is defined in clause 34.

42 *Submission 5*, p. 3.

43 *Committee Hansard*, 24 May 2013, pp 2-3.

44 *Submission 9*, pp 2-3. See also, Professor AJ Brown, *Submission 28*, p. 5.

> If it is not included, the whistleblower also runs the risk of not identifying the correct prescribed internal recipient and making an unprotected disclosure.[45]

2.39 Some submissions also noted that disclosures to supervisors and managers are specifically covered in the public interest disclosure legislation in other jurisdictions. For example, subparagraph 15(1)(c)(i) of the *Public Interest Disclosure Act 2012* (ACT) explicitly allows for a disclosure to be made to 'a person who, directly or indirectly, supervises or manages the discloser'.[46]

Departmental response

2.40 In an answer to a question on notice, the Department explained that the approach taken in the Bill is intended to avoid uncertainty:

> The approach…that an internal disclosure [must] be made within an agency to an authorised officer, is intended to avoid uncertainty that could otherwise arise if it is unclear whether an officer is making a public interest disclosure or otherwise reporting.[47]

2.41 The Department's answer pointed to the obligations of 'principal officers' in each agency, under subclause 59(3), to ensure that there are sufficient numbers of 'authorised officers' in that agency and that 'public officials' in the agency are aware of the identity of the 'authorised officers'. The Department noted that an authorised officer may, in some cases, also be a discloser's supervisor.[48]

2.42 At the public hearing, a departmental officer explained the process relating to a disclosure made by a person to his or her supervisor, in circumstances where the supervisor is not also an authorised officer:

> Were a person to disclose possible misconduct to their immediate supervisor, then the supervisor would be responsible [for] saying, 'Do you know there is a proper officer for disclosing those things to? Here is a list of the authorised officers for our agency.' It would be the same way as if a person who worked for me came and said to me that they thought they were being sexually harassed, I would know to refer them to the sexual harassment contact officer in my agency.[49]

---

45 *Submission 17*, p. 8.

46 CPSU, *Submission 5*, pp 3-4; Dr Gabrielle Appleby, Dr Judith Bannister, Ms Anna Olijnyk, *Submission 9*, p. 3; Accountability Round Table, *Submission 17*, p. 8; Professor AJ Brown, *Submission 28*, p. 5. Paragraph 17(3)(d) of the *Public Interest Disclosure Act 2010* (Qld) provides for disclosure to 'another person who, directly or indirectly, supervises or manages the person'.

47 Answers to questions on notice, received 20 May 2013, p. 6.

48 Answers to questions on notice, received 20 May 2013, p. 6.

49 Ms Renée Leon, Department of the Prime Minister and Cabinet, *Committee Hansard*, 24 May 2013, p. 29.

2.43 The officer conceded, however, that it is not a requirement under the Bill for a supervisor to refer a person to an authorised officer:

> In practice we are all educated and informed, and I would expect that every agency would put in place appropriate procedures for this legislation as we have for all of our other Public Service frameworks so that officers with supervisory responsibilities understand the framework in which they and their staff operate. So, if a person makes a disclosure to their supervisor, their supervisor has access to departmental information about how best that should be handled. Just as the [*Sex Discrimination Act 1984*] does not require a supervisor to refer a person who makes a sexual harassment complaint to a sexual harassment contact officer, that is not required by the legislation. But large organisations and public service organisations do in fact establish internal practices and procedures to help their employees navigate the web of responsibilities and rights[.][50]

Emergency disclosures

2.44 A public official can make an emergency disclosure where the following requirements, among others, are met:

- the person believes on reasonable grounds that the information concerns a substantial and imminent danger to the health or safety of one or more persons; and
- if the discloser has not previously made an internal disclosure of the same information, there are exceptional circumstances justifying the discloser's failure to make such an internal disclosure; and
- if the discloser has previously made an internal disclosure of the same information, there are exceptional circumstances justifying this disclosure being made before an investigation of the internal disclosure is completed.[51]

2.45 A number of submissions contended that the scope of information in relation to which an emergency disclosure can be made is overly restrictive.[52] The Australian Broadcasting Corporation (ABC) provided a number of examples to demonstrate how limiting it considers the provisions to be:

> The disclosure can only concern a 'substantial and imminent danger to the health or safety of one or more persons'. It is not enough that the risk is inevitable or that the eventual harm might be lessened or prevented if prompt action is taken; the danger must be about to happen (imminent). It is not enough that the harm is only 'serious'—it must be 'substantial'—or that

---

50 Ms Renée Leon, Department of the Prime Minister and Cabinet, *Committee Hansard*, 24 May 2013, p. 29.

51 Item 3 of the table in subclause 26(1).

52 See, for example, ABC, *Submission 12*, pp 6-7; Accountability Round Table, *Submission 17*, p. 7; Joint Media Organisations, *Submission 19*, pp 3-4; Law Council of Australia, *Submission 24*, pp 11-12.

> it is repeated or widespread. So, for instance, it is questionable whether an emergency disclosure could be made about an individual who repeatedly molests children, or an institution that condones such behaviour, unless the abuse reached some level that was regarded as 'substantial' and it was apparent that the abuse of the next child was 'imminent'. Emergency disclosures are not authorised outside of the health and safety arenas. So, for instance, it would not be available for reports about significant harm to the environment or to animals, such as concerns about the likelihood or impact of a massive oil spill.[53]

2.46 The Law Council of Australia argued that the reasons for this restriction are unclear:

> It is not clear why this 'emergency disclosure' protection is limited to situations of substantial and imminent danger to health or safety. There may be other situations calling for urgent response where there may be a substantial and imminent threat to other public interests such as protection of public moneys or public assets.
>
> For example, an individual may be aware of some improper aspect of a decision process leading up to [the awarding] of a major tender. It seems to be in the public interest for there to be a framework for protecting emergency disclosure which prevents the Commonwealth being committed to an expensive contract which could be very difficult to unravel once it is entered into.[54]

2.47 The Accountability Round Table made a number of recommendations to amend the emergency disclosure provisions:

> The requirement of 'imminence' should be removed. The definition should at least cover the situation where the information points to a risk of substantial danger to health or safety…It should also expressly extend to substantial environmental risks – only environmental risks that pose a substantial danger to health or safety would be covered by the Bill's provisions.[55]

2.48 In its submission, the Joint Media Organisations expressed concern at the lack of detail for the requirement for 'exceptional circumstances' to justify the emergency disclosure:

> [T]here must be '*exceptional circumstances*' to justify the whistle-blower's failure to disclose the information internally, or make the [emergency] disclosure before the disclosure investigation has been finalised. There is no explanation or justification for such restrictions…If such a requirement is to be included, it should be accompanied by some examples of what would be considered exceptional circumstances, including a reasonable apprehension

---

53 *Submission 12*, pp 6-7. See also, Joint Media Organisations, *Submission 19*, pp 3-4.

54 *Submission 24*, p. 11.

55 *Submission 17*, p. 7.

> that internal disclosure would not result in sufficiently timely action, could result in harm to the discloser or others, or the concealment of evidence.[56]

Departmental response

2.49 The Department explained that the emergency disclosures provisions implement the Australian Government's response to a recommendation in the 2009 House of Representatives Committee's report.[57]

2.50 The Department pointed out that, if a disclosure does not meet the requirements for an emergency disclosure, a 'substantial' but not 'imminent' threat to public safety may be disclosable conduct for the purposes of a protected external disclosure providing the criteria for an external disclosure are otherwise met.[58]

2.51 On the requirement for 'exceptional circumstances', the Department provided the following example:

> A set of circumstances which could give rise to an emergency disclosure would be if a public official had made an internal disclosure that procedures for the storage of hazardous material had not been complied with. In this case, the Bill allows emergency disclosure if there are exceptional circumstances justifying the disclosure being made before an investigation is complete. For this purpose an exceptional circumstance could be that the investigation into the disclosure was taking too long to complete having regard to the risk to the health or safety of any person.[59]

---

56 *Submission 19*, p. 4, emphasis in original. See also, ABC, *Submission* 12, pp 6-7; Law Council of Australia, *Submission 24*, pp 11-12.

57 Answers to questions on notice, received 20 May 2013, p. 9. Recommendation 21 of the House of Representatives Committee's report was that public interest disclosure legislation should 'protect disclosures made to the media where the matter has been disclosed internally and externally, and has not been acted on in a reasonable time having regard to the nature of the matter, and the matter threatens immediate serious harm to public health and safety': see House of Representatives Standing Committee on Legal and Constitutional Affairs, *Whistleblower protection: a comprehensive scheme for the Commonwealth public sector*, February 2009, p. 164.

58 Answers to questions on notice, received 20 May 2013, p. 9.

59 Answers to questions on notice, received 20 May 2013, p. 9.

Exclusion of conduct connected to intelligence agencies and intelligence information

2.52 A number of submissions objected to the provisions of the Bill which deal with the conduct of intelligence agencies and the handling of intelligence information, arguing that the provisions effectively exclude this conduct and information from being the subject of public interest disclosures.[60]

2.53 For example, Dr Dreyfus argued:

> It is naturally wise to keep some types of information secret for the purposes of protecting the national interest, however intelligence agencies and the information attached to them should not be excluded simply by reason of this fact. Typically, in organisations where by design there is less publically available information, there is the greatest opportunity for wrongdoing.[61]

Conduct connected to intelligence agencies

2.54 Clause 33 provides that certain conduct connected with intelligence agencies is not disclosable conduct. Specifically, it is not disclosable conduct where the conduct that an intelligence agency engages in is:

- in the proper performance of its functions or the proper exercise of its powers; or
- conduct that a public official who belongs to an intelligence agency engages in for the purposes of the proper performance of its functions or the proper exercise of its powers.

2.55 On the definition of conduct connected to an intelligence agency in clause 33, Professor Brown contended:

> [Clause 33] provides a definition of excluded intelligence agency conduct which could be judicially interpreted as meaning any conduct that is technically lawful and authorised (for a 'proper' purpose or exercise of a function, in administrative law terms) is not disclosable, in any way, even if it otherwise involves defined wrongdoing[.][62]

2.56 The Accountability Round Table expressed a similar concern regarding the interpretation of this clause:

> [Clause 33] excludes from the class of disclosable conduct, any conduct engaged in by an intelligence agency or one of its public officials 'in the proper performance of its functions or the proper exercise of its powers'.

---

60 Accountability Round Table, *Submission 17*, pp 5-6; Professor AJ Brown, *Submission 28*, pp 6-7.

61 *Submission 14*, p. 2.

62 *Submission 28*, p. 6.

> Unless there is some special meaning attaching to the word 'proper' this section does no more than purport to exclude conduct that is not included in the first place.
>
> The exclusion is, however, capable of being construed as referring to conduct that is engaged in while exercising a legal authority given by law – which would exclude most if not all intelligence agency conduct from the system.[63]

2.57 The Accountability Round Table recommended that clause 33 be either removed from the Bill or, if not removed, should be amended:

> [T]he purpose of the provision needs to be clarified and an appropriate alternative provision recommended, enabling the effective disclosure of emergent 'wrongdoing' on the part of intelligence agencies and officials, on the basis that it is consistent with the objects of the Bill to do so.[64]

2.58 At the public hearing, Dr Vivienne Thom, the Inspector-General of Intelligence and Security, explained her understanding of the interpretation of clause 33:

> There have been some comments…that [clause 33] somehow has the effect that these agencies [are] entirely outside the scheme. I do not see that as correct. I understand clause 33 to be a narrow exception that would apply to a small number of overseas activities. I take the view that the use of the word 'proper' goes to both propriety and legality. For something to be proper, it must first be consistent with Australian law. There are a limited number of situations where the [*Intelligence Services Act 2001*] provides an immunity for intelligence officers acting properly in the course of their duties. It is these types of cases [to which] I would [see] clause 33 as applying.[65]

2.59 The EM to the Bill appears to confirm that interpretation of clause 33:

> [Clause 33] is necessary as in certain circumstances intelligence agencies are authorised to engage in conduct in a foreign country, in the proper performance of a function of the agency, which might otherwise be inconsistent with a foreign law or, in certain circumstances, Australian law. Those actions may therefore fall within the definition of 'disclosable conduct' in clause 29…In these situations, it is important that the Australian intelligence capability, which is authorised by Australian legislation, is not undermined or otherwise impacted where the actions taken are fully within the proper performance of the duties or functions of an agency. Clause 33 will also ensure that this conduct does not come within the scope of the scheme.[66]

---

63 *Submission 17*, pp 5-6.

64 *Submission 17*, p. 6.

65 *Committee Hansard*, 24 May 2013, p. 21.

66 EM, p. 18.

Intelligence information

2.60 External, emergency and legal practitioner disclosures must not consist of, or include, 'intelligence information'.[67] Clause 41 sets out the meaning of 'intelligence information'. There are seven categories of intelligence information, including information that has originated with, or has been received from, an intelligence agency and 'sensitive law enforcement information'.

2.61 Submissions were critical of the type and breadth of material which would be excluded under the Bill because of the definition of 'intelligence information' in clause 41. For example, the ABC claimed:

> The type of information captured by the definition of 'intelligence information' in [clause] 41 is extremely broad…Such restrictions on disclosure could, if enacted, mean that whistleblowers have nowhere to go if an internal disclosure is not properly dealt with and their concerns relate to such things as extraordinary rendition, unlawful interception of citizens' phone calls, the use of torture in interrogations of detainees, or humiliating and degrading treatment of prisoners. The Bill should be amended to permit whistleblowing in the public interest to ensure that intelligence and law enforcement agencies are held accountable for unlawful and other serious misconduct.[68]

2.62 At the public hearing, Dr Dreyfus suggested that a better approach would be to include a test in the legislation which creates a causal link between the risk of harm to national security or operations and the public interest in having the particular information disclosed:

> [T]he disclosure [sh]ould be protected if the information posed no immediate risk to ongoing operations nor carries a risk of harm to others and is a revelation of serious wrongdoing in the public interest – only then [sh]ould it be protected.[69]

2.63 At the public hearing, Dr Thom pointed out that disclosures of intelligence information can be made to the IGIS:

> While it is true that the bill has a prohibition on public or external disclosures of intelligence information, the bill does provide that the disclosure can be made to [the IGIS's] office, which is quite independent from the agencies. So, although disclosure to [the IGIS's] office is defined in the bill as internal, it is…independent of the agency, and I think that point needs to be clarified…[T]he risk of the disclosure of intelligence

---

67 Paragraph (h) of item 2, paragraph (f) of item 3 and paragraph (c) of item 4 of the table in subclause 26(1), respectively.

68 *Submission 12*, p. 5.

69 *Committee Hansard*, 24 May 2013, p. 7. The test described by Dr Dreyfus is that used in the Public Interest Disclosure (Whistleblower Protection) Bill 2012, introduced by Mr Andrew Wilkie MP. See also, Blueprint for Free Speech, *Submission 13*, p. 6.

> information would have serious consequences. Once information is out it cannot be retrieved. I think it would be very difficult for an official themselves to balance the risk against the benefits of disclosure.[70]

2.64 The joint submission from the Australian Security Intelligence Organisation (ASIO) and the Australian Secret Intelligence Service (ASIS) supported the approach taken in the Bill with respect to intelligence information:

> This exemption strikes a balance between accountability and protection of national security information. It explicitly recognises the current legislative and oversight framework in which intelligence officers and agencies are answerable to the IGIS…The IGIS provides an independent mechanism for concerns with the actions of [Australian Intelligence Community] agencies to be raised and appropriately considered without the need for an external disclosure mechanism. This avoids the significant risks for national security, global intelligence relationships and the safety of individuals that any external disclosure mechanism would carry. The IGIS has ably provided the 'whistle blowing' function for ASIO and ASIS to date and will continue to do so with increased protections for those seeking to make a disclosure to that office under the regime to be introduced by the Bill.[71]

Departmental response

2.65 In relation to the exclusion of intelligence information from external disclosures, the EM states:

> Intelligence information is treated this way under the Bill because the disclosure of intelligence information can have grave consequences for Australia's national security, its relationship with other countries and the safety of individuals.[72]

2.66 In an answer to a question on notice, the Department provided a further explanation for the exclusion of intelligence information from the Bill's external disclosure provisions:

> Inadvertent or inappropriate disclosure of intelligence information may compromise national security and potentially place lives at risk. Australian intelligence agencies have obligations to their foreign partners to maintain confidentiality of information shared for the purpose of assisting those agencies to fulfil their national security functions.
>
> A discloser who is dissatisfied with the handling of [a] public interest disclosure by an intelligence agency could make a complaint to the IGIS.[73]

---

70 *Committee Hansard*, 24 May 2013, pp 21-22.

71 *Submission 7*, pp 1-2.

72 EM, p. 20.

73 Answers to questions on notice, received 20 May 2013, p. 9.

Loss of immunity from civil, criminal or administrative liability

2.67 Clause 10 provides that, if an individual makes a public interest disclosure, he or she is not subject to any civil, criminal or administrative liability (including disciplinary action) for making the disclosure. The immunity in clause 10 does not apply, however, to making a statement that is false or misleading (subclause 11(1)).

2.68 Many submissions argued that the immunity in clause 10 should only be lost where a person knowingly makes a false or misleading statement.[74] The CPSU explained why this should be the case:

> While it is important that persons who deliberately make false and damaging statements are excluded from protection under the scheme, this drafting of [clause 11] would also remove the protection from people who honestly believe that the information that they are disclosing is true and disclose the information in good faith.[75]

Departmental response

2.69 In response to a question on notice, the Department acknowledged that there is a drafting error in clause 11:

> The absence of a qualifying reference to 'knowingly' making a false or misleading statement is an omission.[76]

2.70 At the committee's public hearing, a departmental officer advised that it is 'reasonably likely' that an amendment to clause 11 would be agreed to by the government.[77]

Omission of conduct of members of parliament from the Bill's coverage

2.71 The definition of 'public official' in the Bill does not include members of parliament (MPs and senators), staff employed under the *Members of Parliament (Staff) Act 1984* (MOPS Act), or judicial officers and members of a Royal Commission.[78] This omission means that MPs, senators and their staff (and judicial officers and members of a Royal Commission) would be unable to make a public

---

74 See, for example, CPSU, *Submission 5*, p. 5; Australian Council of Trade Unions, *Submission 6*, p. 2; Dr Gabrielle Appleby, Dr Judith Bannister, Ms Anna Olijnyk, *Submission 9*, pp 3-4; ABC, *Submission 12*, p. 2; Joint Media Organisations, *Submission 19*, p. 9; Law Council of Australia, *Submission 24*, p. 6.

75 *Submission 5*, p. 5.

76 Answers to questions on notice, received 20 May 2013, p. 4.

77 Ms Renée Leon, Department of the Prime Minister and Cabinet, *Committee Hansard*, 24 May 2013, p. 28.

78 Subclause 69(4) provides, for the avoidance of doubt, that a judicial officer or a members of a Royal Commission are not public officials for the purposes of the Bill.

interest disclosure, and their behaviour or conduct could not be the subject of a public interest disclosure pursuant to the legislation.

2.72 The exclusion of MPs and senators, and their staff, from coverage under the Bill is in line with the Australian Government's response to the 2009 report of the House of Representatives Committee. The House of Representatives Committee considered whether public interest disclosure legislation should cover MPs and senators, but did not explicitly recommend that they should be covered by such a scheme. The House of Representatives Committee's report did, however, recommend that any public interest disclosure legislation should provide for the Ombudsman to be the authorised recipient for disclosures by staff employed under the MOPS Act.[79]

2.73 The Australian Government's response to the House of Representatives Committee's report did not accept this recommendation:

> The [Public Interest Disclosure] Bill will not authorise employees under the [MOPS Act] to make disclosures under the scheme.
>
> Disclosures will not be able to be made under the scheme about Members of Parliament. Allegations of wrongdoing by Members of Parliament should be addressed by the Parliament.[80]

2.74 A number of submissions were critical of the omission of MPs and senators, and their staff, from the definition of 'public official'.[81] The Accountability Round Table explained the implications of the exclusion of MPs and senators (and judicial officers):

> The Bill, in defining 'public official', does not include the elected members of the executive branch or their personal staff or the judiciary. As a result wrongdoing of the kind covered by [clause 29 (disclosable conduct)], in respect of other public officials, is not something that falls within the system to be established under the Bill. A public official who discloses such wrongdoing by a member of parliament or a judge will not receive protection under the Bill, and the claimed wrongdoing will not be subject to investigation under the Bill. Thus, while maladministration may be the subject of disclosures protected under the Bill where they involve other public officials, information pointing to corrupt conduct by members of parliament or judicial officers will not.[82]

---

79 House of Representatives Standing Committee on Legal and Constitutional Affairs, *Whistleblower Protection: a comprehensive scheme for the Commonwealth public sector*, Recommendation 4, p. 55.

80 *Government Response to the House of Representatives Standing Committee on Legal and Constitutional Affairs report on Whistleblower protection: a comprehensive scheme for the Commonwealth public sector*, tabled 17 March 2010, p. 5.

81 See, for example, Blueprint for Free Speech, *Submission 13*, pp 6-7; Joint Media Organisations, *Submission 19*, pp 8-9.

82 *Submission 17*, p. 4.

2.75 Submissions and witnesses to the inquiry argued that there is not an adequate justification for the Bill to exclude MPs and senators, and their staff, from the definition of 'public official'.[83] For example, Dr Dreyfus contended strongly that MPs and senators should be covered by the Bill:

> Whilst Australians place (rightly) great faith and trust in their elected officials, there has been and always will be examples of corruption, maladministration and wrongdoing at all levels of government, including those perpetrated by elected officials. A properly enacted public interest disclosure bill should account for this possibility.[84]

2.76 In a similar vein, Professor Brown argued that disclosures by the staff of MPs and senators (including ministerial staff) should also be covered:

> [Staff of MPs] are merely a different form of contractor to the Commonwealth and should be covered…if only so that such a staff-member who makes a disclosure about wrongdoing anywhere in government is entitled to the same remedies as any other contractor if they later suffer adversely for it…
>
> Having such a significant category of Commonwealth taxpayer-funded contractors unable to claim protection under the scheme, is likely to raise doubts in the mind of the rest of the public sector regarding whether the Parliament is really serious about providing protection to any of the other classes of person covered.[85]

Departmental response

2.77 At the public hearing, a departmental officer reiterated that the government's policy is 'that the appropriate supervision of MPs is by the parliament and…that is the appropriate place for MPs' conduct to be exposed, reported and made accountable[, t]hat is where MPs' accountability lies'.[86]

---

83 See, for example, Joint Media Organisations, *Submission 19*, p. 8; Mr Howard Whitton, *Submission 25*, p. 5.

84 *Submission 14*, p. 10.

85 *Submission 28*, p. 5. See also, Accountability Round Table, *Submission 17*, p. 5.

86 Ms Renée Leon, Department of the Prime Minister and Cabinet, *Committee Hansard*, 24 May 2013, p. 33. See also, Department of the Prime Minister and Cabinet, answers to questions on notice, received 20 May 2013, p. 6.

Members of parliament as recipients of public interest disclosures

2.78 Although the conduct of MPs and senators cannot be the subject of a public interest disclosure, such persons are able to be recipients of external and emergency disclosures under clause 26 of the Bill, which can be made to 'any person other than a foreign public official'.[87]

2.79 The Joint Media Organisations recommended that the phrase 'any person other than a foreign public official' should be clarified, to make clear that such persons would include the media, journalists and MPs.[88]

2.80 Some submissions expressed the view that the Bill should explicitly provide for MPs and senators as authorised recipients for all disclosures – in their own right, and not merely as a possible (but unspecified) recipient under the broad definition of 'any person other than a foreign public official'. For example, Dr Dreyfus argued:

> Members of Parliament should also be included as appropriate recipients of disclosures. Often it can be the case that MPs are in a special position to assist a disclosure with access to the right people, the right information or be able to provide special assistance to a discloser in another way. The Bill should reflect this special position of MPs.[89]

Departmental response

2.81 In answers to questions on notice, the Department explained why the Bill does not expressly provide for external disclosures to specific categories of persons:

> It is a simpler approach to permit disclosure to any person (other than a foreign public official) for the purposes of an external disclosure.[90]

2.82 At the public hearing, a departmental officer elaborated on this point:

> [I]f we start specifying who[,] that means we always run the risk that we are taken to imply that certain other people are not covered if we start specifying people who are covered. So we have sought to express that as broadly as possible by saying that you can disclose to any person other than a foreign official.[91]

---

87 Ms Renée Leon, Department of the Prime Minister and Cabinet, *Committee Hansard*, 24 May 2013, p. 30; Department of the Prime Minister and Cabinet, answers to questions on notice, received 20 May 2013, p. 8. See also, Law Council of Australia, *Submission 24*, p. 11.

88 *Submission 19*, p. 5.

89 *Submission 14*, p. 11. See also, Blueprint for Free Speech, *Submission 13*, pp 11-12.

90 Answers to questions on notice, received 20 May 2013, p. 8.

91 Ms Renée Leon, Department of the Prime Minister and Cabinet, *Committee Hansard*, 24 May 2013, p. 30.

Inclusion of clause 81 and preservation of parliamentary privilege

2.83 Clause 81 provides that, for the avoidance of doubt, the Bill does not affect the powers, privileges and immunities of the Senate, and the House of Representatives, and the members of each House of the parliament and the committees of each House of the parliament, under section 49 of the Constitution. The powers, privileges and immunities conferred by, or arising under, the *Parliamentary Privileges Act 1987* are also not affected by the Bill.

2.84 The Clerk of the Senate, Dr Rosemary Laing, criticised the inclusion of clause 81 in the Bill. The Clerk noted that clause 81 is 'effectively without precedent', and explained why there are sound policy reasons for this:

> The principal reason is the underlying constitutional declaration in section 49 of the powers, privileges and immunities of the Houses, their committees and members. These are to be such as are *declared by the Parliament* (emphasis added) and, until declared are those of the United Kingdom House of Commons at the date of Federation. To alter or modify any power, privilege or immunity requires express statutory declaration. Otherwise, those powers, privileges and immunities continue as adopted in 1901.[92]

2.85 Since the Bill does not expressly apply to MPs and senators, the Clerk argued that the inclusion of clause 81 is unnecessary simply for the avoidance of doubt:

> [I]f the powers, privileges and immunities of the Houses, their committees and members are to be altered or modified, an express statutory declaration is required. If there is no such change to those powers, privileges and immunities, then it is simply not necessary to state that they are unaffected.[93]

2.86 The Clerk explained the implications if clause 81 were to remain in the Bill:

> While there may not be any immediate harm, there may be an insidious and cumulative effect that leads to doubt and confusion about the scope and application of parliamentary powers, privileges and immunities, at the Parliament's expense.[94]

2.87 The Clerk also referred to the Australian Law Reform Commission's 2009 report, *Secrecy Laws and Open Government in Australia*, which noted that the question of whether or not parliamentary privilege could be abrogated by necessary implication is a controversial one in relation to which no definitive view or court ruling has emerged.[95]

---

92 *Submission 1*, p. 2.

93 *Submission 1*, p. 5.

94 *Submission 1*, p. 6.

95 *Submission 1*, p. 7, referring to Australian Law Reform Commission, *Secrecy Laws and Open Government in Australia*, 2009, paragraphs 16.195-8, pp 595-6.

2.88 Accordingly, the Clerk advised:

> In the absence of such a ruling, the Senate should be cautious about letting through any provision that could foster the potential limitation of its powers, privileges and immunities by implied rather than direct means. Such a stance is consistent with section 49 of the Constitution.[96]

Departmental response

2.89 The House of Representatives Committee recommended that any public interest disclosure legislation should provide that nothing in that legislation affects the immunities of proceedings in the parliament under section 49 of the Constitution and the *Parliamentary Privileges Act 1987*.[97] The Australian Government response to the House of Representatives Committee's report accepted this recommendation, stating that '[f]or the avoidance of doubt' the government's proposed public interest disclosure legislation would include such a provision. The Department explained that clause 81 of the Bill implements the government's acceptance of the recommendation of the House of Representatives Committee.[98]

2.90 In response to the Clerk of the Senate's view that clause 81 is unnecessary, the Department referred to submissions to the House of Representatives Committee's inquiry from the then Clerk of the Senate and the then Acting Clerk of the House of Representatives. Those submissions supported the inclusion of a provision, such as clause 81, where legislation provides for public interest disclosures to members of either House of the parliament.[99]

2.91 The Department's answers to questions on notice implied that, on the basis of these submissions to the House of Representatives Committee, clause 81 is necessary to avoid doubt as to the impact the Bill may have on parliamentary privilege:

> The Bill provides for a protected external or emergency public interest disclosure to be made to 'any person other than a foreign official', which could include a disclosure to a Member of the Parliament, if the criteria for those disclosures are met in clause 26.[100]

---

96 *Submission 1*, p. 7.

97 House of Representatives Standing Committee on Legal and Constitutional Affairs, *Whistleblower Protection: a comprehensive scheme for the Commonwealth public sector*, Recommendation 24, p. 166.

98 Answers to questions on notice, received 20 May 2013, p. 11.

99 Answers to questions on notice, received 20 May 2013, p. 11.

100 Answers to questions on notice, received 20 May 2013, p. 11.